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No. 76-1701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

TENNESSEE VALLEY AUTHORITY,
Petitioner,
v.
HIRAM G. HILL, JR.
ZYGMUNT J.B. PLATER
DONALD S. COHEN
THE AUDUBON COUNCIL OF TENNESSEE, INC.
THE ASSOCIATION OF SOUTHEASTERN BIOLOGISTS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents respectfully request the Court to deny the petition for certiorari, on the ground that the construction and application of the Endangered Species Act to the TVA Tellico Project were clearly and correctly decided in the unanimous decision of the Sixth Circuit Court of Appeals. A political resolution of the conflict between the Tellico dam and the Act is currently being considered by Congress.

OPINIONS BELOW, JURISDICTION, AND STATUTES

The Sixth Circuit unanimously reversed the decision of the district court, in an opinion written by Celebrezze, J., concurring opinion by McCree, J., 549 F.2d 1064 (6th Cir. 1977), *reversing* 419 F. Supp. 753 (E.D. Tenn. 1976); opinions set out in petitioner's brief at 1A, 22A.

Jurisdiction of this Court is adequately set out in petitioner's brief.

Section 7 of the Endangered Species Act, 16 U.S.C. 1536, prohibits federal actions which "jeopardize the continued existence of . . .endangered species. . .or result in the destruction. . .of habitat. . .determined. . .to be critical" and is adequately set out in petitioner's brief at 2-3.

QUESTIONS PRESENTED

Was the Sixth Circuit Court of Appeals correct, on the basis of the district court's finding of facts constituting a violation of the Endangered Species Act—

(a) in deciding that the law applied to the dam portion of the Tellico Project, and

(b) in prohibiting continued violation of the Act?

BACKGROUND

The Tellico Project is a TVA regional development project originally planned around an impoundment, one of the last two of 68 dams in the Tennessee River Valley area. The primary functions of the project are industrial development and recreational management, neither of

which requires a dam. The only projected benefits which directly required a dam were negligible on the official benefit-cost ratio — little flood control, limited barge transit, limited power production since the dam has no generators, and no irrigation.

The river qualities which have preserved the snail darter in its last remaining habitat also present significant values for human benefit, making the Little Tennessee the best remaining river in the region for family float trips, prime trout fishing, and flowing water recreation. Located at the edge of the heavily used Great Smokies National Park, the resources of the unimpounded Valley now owned by TVA contain great potential for alternative project development based on the river: a dozen important prehistoric, colonial and Cherokee sites (including the birthplace of Chief Sequoia, Chota town, the Cherokees' Jerusalem, and Tennassee town which gave its name to the state) which possess great tourist potential if they remain unflooded; 16,000 prime agricultural acres; a unique regional recreational management resource; and prime industrial sites.

TVA first collected the endangered fish in 1973, when slightly more than $35 million of the project's current budget of $127.5 million had been spent, primarily on land acquisition, roads, bridges, and planning. Since that time the agency has consistently declined to conserve the darter in its only natural habitat, despite requests from the Governor of Tennessee and citizens to modify the original project plans to incorporate the feasible river-based alteratives.

As noted in the petition, the district court found that successful transplantation was conjectural, and completion of the reservoir portion of the Tellico Project would in all likelihood extirpate the snail darter.

PETITIONER'S ARGUMENTS DO NOT SUBSTANTIATE THE NEED FOR REVIEW OF THE SIXTH CIRCUIT'S DECISION BY THIS COURT

1. Summary of Argument.

The Endangered Species Act of 1973 is an important national conservation statute imposing strong, practicable standards and procedures upon federal agency actions.

The Sixth Circuit's Tellico decision is a measured and appropriate application of the Act to that TVA project, and recognizes the proper division of roles between agencies, courts, and the Congress:

The Sixth Circuit decision implements the clear language and policies of the Act establishing a mandatory duty for agency compliance.

The decision implements the established judicial role of requiring compliance with federal law, leaving the resolution of conflicts between projects and statutes to the political process, as Tellico and the Endangered Species Act are currently being reviewed in Congress.

The decision represents the clear weight of authority in refusing to embark upon construction of "implied amendments" from appropriations acts which make no mention of statutory conflict or amendatory intent; it also follows established case law in refusing to imply a grandfather clause for ongoing projects which have substantial remaining federal actions which would violate a statute, or which have available alternative developments in the public interest.

2. The statutory language is clear, establishing a mandatory agency duty.

The Sixth Circuit's decision, based upon the district court's finding that the reservoir feature of the Tellico Project would jeopardize the endangered species and destroy its critical habitat, implemented the clear words of Section 7 that agency compliance is mandatory, not permissive.

The construction of the statutory words "shall insure" as mandatory, requiring an injunction, is supported by this Court's recent action in the Mississippi sandhill crane case, *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), *cert. denied* 97 S. Ct. 489 (1977).

As recently noted by the Secretary of Interior, the vast majority of potential conflicts between agency projects and the Act have been resolved through good faith consultation between the Fish and Wildlife Service and federal agencies which accept their obligation to protect endangered species in their natural habitats.[1]

3. Resolution of statutory conflicts is a political role for Congress, not a judicial function.

Congress is currently reviewing the Tellico case and prospective resolutions of the confrontation between the dam and the endangered species. A General Accounting Office review of the complex facts of the case has been initiated, and hearings are being scheduled during this

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[1] News Release, Department of Interior, June 11, 1977, Appendix A herein.

Congressional session in both House and Senate by the committees which properly have jurisdiction over the Endangered Species Act.[2] Bills have been introduced to exempt the project from the Act. H.R. 4557, H.R. 5079, 95th Congress, 1st Session.

The Sixth Circuit decision properly did not attempt to enter into the complexities of balancing Congress's endangered species policies against questioned benefits of the dam, or to quantify ecological, historical, and recreational public values, or retrievable project costs under alternative development schemes. To do so would open the courts to a deluge of subjective politic l decisions which are presently and properly relegated to the legislative process.

Where, as here, a violation exists on the facts, and the administrative process fails to resolve the issue, the judicial role established by this Court's holding in *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) and implemented by the Sixth Circuit's decision, is to issue whatever order is necessary to enforce compliance. 321 U.S. at 328, 329. Congress then is the proper forum to review the situation presented by judicial enforcement of the law.[3]

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[2] Hearings have been scheduled by the Subcommittee on the Environment of the Senate Committee on Environment and Public Works, and will be held later in this session by the Subcommittee on Fish and Wildlife of the House Committee on Merchant Marine and Fisheries, which initiated the GAO study on March 2, 1977. See Appendix B.

[3] *See also, Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-414 (1973), where Section 706 of the Administrative Procedure Act was held to require such enforced compliance via injunction.

4. Judicial creation of implied amendments via appropriations is not supported by authority.

The Sixth Circuit properly declined to construct an implied amendment from the Act for the dam based upon continued appropriations. 549 F.2d at 1072, 1073. Petitioner's principal cases (*Friends of the Earth* and *Dickerson*, cited at 13-16 of their brief) are not applicable, as noted in a recent California case presenting the same allegation.[4] There is no split of authority in the circuit courts regarding implication of exemption amendments in these circumstances, where appropriations bills do not contain any language indicating an intent to amend any substantive law, and legislative history is sparse and ambiguous at best.

Congress has indicated the proper approach to amendments of the Endangered Species Act consistent

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[4] . . . "[D]efendants' reliance upon Friends of the Earth v. Armstrong . . . is misplaced. There, congressional intent was quite explicit both on the face of the acts in question and in the accompanying legislative history. Similarly, in United States v. Dickerson . . . the Court held that Congress could suspend certain provisions of a prior act (military re-enlistment allowances) through an amendment to an appropriation bill. However, in that case congressional intent was manifestly clear from both the language of the Act and the legislative history." *Sierra Club v. Morton*, 400 F. Supp. 610, 638 at n. 42 (N.D. Cal. 1975)

with the Sixth Circuit's holding by past actions[8] and by the present ongoing review of the Tellico Project and the Endangered Species Act in the proper Congressional committees.

5. The appellate court properly declined to imply a statutory exemption for ongoing projects.

The Sixth Circuit's rejection of an implied exemption for ongoing projects is supported by the clear weight of authority. 549 F.2d at 1070-1072. Federal environmental laws apply to projects where a substantial federal action remans to be taken, especially where, as here, the entire injury sought to be avoided by the Act would occur if the agency were permitted to complete the dam segment of the project. *See Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1177 (6th Cir. 1972).

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[8] Prior to passage of the 1976 "Scrimshaw Amendments" to the Act, Senator Kennedy declared on the floor that:

> *Any legislation which amends the Endangered Species Act . . . must be carefully and thoughtfully drawn* to assure that the Congress' commitment to the protection of endangered animals is not diminished. The amendment we approve today has been *under consideration for a year and a half*, has been the subject of *public hearings*, and has had the . . . input of . . . animal protection groups. As a result, we were able to draft this amendment to the Endangered Species Act which reaffirmed and strengthened the resolve of the Congress to protect the whale [the species there threatened]. 122 Congr. Rec. S 10367 (June 24, 1976) [Emphasis added].

Further, the appellate court recognized the continuing possibility for modification of project plans to reconcile development goals with the requirements of the Act:

> We find Judge McCree's expression of the congressional intent behind NEPA to be an accurate reflection of the pervading spirit of the Endangered Species Act:
>
> > '. . .Congress envisaged on-going agency attempts to minimize environmental harm caused by the implementation of agency programs. This could encompass not only *constant reevaluations of projects already begun* to determine whether alterations can be made in existing features or whether there are alternatives to proceeding with projects as initially planned, but also the consideration of the environmental impact of all proposed agency action.' 549 F.2d at 1072 citing *EDF v. TVA*, 468 F.2d 1164, 1176 (6th Cir. 1972). [emphasis added by the Court].

Congressional action currently reviewing alternative development possibilities for the Valley emphasizes the Act's flexibility in accommodating competing interests even at the present extended project stage.

6. Conclusion.

The Sixth Circuit's decision is a clearly stated presentation of the Endangered Species Act's requirements, based upon established authority, and declining

to enter the subjective arenas of political balancing and statutory amendment by implication.

The decision implements the proper division of roles between agencies, courts and Congress: agencies to consult in good faith to reconcile public development projects with protection of endangered species in their natural habitat, courts to enforce the law on the facts in the cases where agency consultation fails to resolve the issue, and Congress to review and resolve the remaining conflicts in the political forum where the Tellico case now rests.

For the foregoing reasons the case does not appear to require an exercise of the Court's discretion to grant certiorari: The Sixth Circuit's decision represents a fair, practical and proper statement of the law and deserves to be supported.

Respectfully submitted,

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Wayne Law School
Detroit, Michigan

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Knoxville, Tennessee

Dated: June 30, 1977

APPENDIX A

DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY **NEWS RELEASE**

For Release 9:00 a.m. (MDT) June 11, 1977

CONFLICTS BETWEEN ENDANGERED SPECIES AND FEDERAL PROJECTS HAVE BEEN OVER-EMPHASIZED, SECRETARY ANDRUS SAYS

Estes Park, Colorado — Secretary of the Interior Cecil D. Andrus said today that conflicts between endangered species and federal projects have been over-emphasized and most problems have been resolved through negotiations between agencies.

The Secretary told the National Audubon Society that in three years since passage of the Endangered Species Act,, the Fish and Wildlife Service has had 124 documented consultations and another estimated 4,500 informal consultations with other federal agencies to iron out problems. He said these efforts have resolved the problems at the regional level in all but three cases.

"Most conflicts between endangered species and federal projects can be resolved and have been," the Secretary said.

"Under that Act, my role as Secretary of the Interior is to assure the protection and enhancement of endangered species, and I intend to fulfill that responsibility," Andrus said.

"If an irresolvable conflict arises — and judging by the record so far there are few — then and only then Congress should evaluate all aspects of the project — its economic and social impacts, its environmental effects over and above any effects on endangered species, who will benefit, and so forth. After this evaluation the Congress could decide whether that project is more important than the loss of the species forever."

Andrus pointed out that the President in his Environmental Message had ordered identification of all critical habitat under federal jurisdiction or control, and this would help avoid conflicts such as the current situation involving the endangered snail darter and Tellico Dam in Tennessee.

The Secretary outlined for the Audubon Society some of the many assignments given to the Department of the Interior in President Carter's Environmental Message last month. The Secretary said the President's message "amounts to a major reassessment of the nation's environmental policy — to strengthen it, to improve the quality of life, to preserve the best of America for ourselves and for the future."

* * *

APPENDIX B

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON
MERCHANT MARINE AND FISHERIES
Washington, D.C. 20515

March 2, 1977

Honorable Elmer B. Staats
Comptroller General of the United States
General Accounting Office
Washington, D.C. 20548

Dear Mr. Staats:

Legal questions have arisen between the Federal Endangered Species Act of 1973 (16 U.S.C. 1531 ff) and the nearly-completed reservoir segment of the Tennessee Valley Authority Tellico Project, a recreational-industrial development project in East Tennessee with associated benefits in barge-navigation, peaking power generation, and incremental water control.

The terms of the permanent injunction in the U.S. Sixth Circuit Court of Appeals call for a halt to all construction work on the reservoir portion. The appropriate Congressional Committees may consider a specific project exemption from the Endangered Species Act, based upon review of the value of the project with a reservoir component as originally designed, and of the value to the public if project assets are modified for alternate public land and water uses.

The specific inquiries necessary to provide information for Congressional review of these alternatives are the following:

1. To quantify the value of the resources and materials directly invested in the dam structure to date for which there is no alternative public utility or which would be irretrievably lost in the event that Congress decides that the Valley should not be flooded.

2. To assess the potential value of the recoverable project expenditures in land, road facilities, bridges, and infrastructures, when developed for alternative utilizations to a reservoir, e.g., agricultural production management, historical site management, national river recreation area management, and non-reservoir industrial development, or a combination thereof, including consideration of unquantifiable public values and of alternative management models prepared by the State of Tennessee and University of Tennessee researchers.

3. To analyze the current Tellico cost-benefit analysis, its assumptions and data basis, and ascertain for Congress' review of alternatives the actual public benefits and losses that would be produced by a decision to complete dam expenditures and flood the reservoir

portion of the Valley. Such a review should reflect the existence of the immediately adjacent reservoirs of Melton Hill, Fort Loudon, Watts Bar, and Chilhowee, in flatwater recreation, industrial development performance, water quality, agriculture, etc.

4. To analyze the extent to which projected reservoir-based benefits, in recreation, industrial development, flood control, etc., could be achieved by a river-based management model as opposed to a reservoir-based management model.

Our committee requests that a study be undertaken to examine these questions and to supply Congress with a thorough analysis of this issue. For purposes of ongoing communications with your office, please contact Mr. James W. Spensley, Counsel for the Subcommittee on Fisheries and Wildlife Conservation and the Environment (225-7307), who will act as coordinator for the Committee on this fact-finding project.

Sincerely,

/s/ John M. Murphy
Chairman
Committee on Merchant
Marine and
Fisheries

/s/ Robert L. Leggett
Chairman
Subcommittee on
Fisheries and
Wildlife Conservation
and the Environment

/s/ Edwin B. Forsythe
Ranking Minority
Member